SUPREME COURT OF APPEALS OF VIRGINIA.

RATCLIFFE et al. *v.* WALKER.

June 10, 1915.

[85 S. E. 575.]

1. **Husband and Wife (§ 324*)—Alienation of Affection—Liability of Relatives.**—Where a parent, brother, or sister acts in good faith and is prompted by worthy motives in advising a wife or husband to separate from the other spouse, even though such advice results in separation and estrangement, the advising relative is not liable as for alienation; but, if it be made to appear that such relative was actuated by malice, and willfully interfered for such reason, not for the welfare of the related spouse, an action will lie on behalf of the injured spouse for alienation.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1118; Dec. Dig. § 324.* 7 Va.-W. Va. Enc. Dig. 179; 14 Va.-W. Va. Enc. Dig. 517; 15 Va.-W. Va. Enc. Dig. 466.]

2. **Conspiracy (§ 19*)—Alienation of Affections—Liability of Relatives—Evidence.**—In an action for alienation against the parents, brothers, and sister of a wife who had separated from her husband, evidence held sufficient to sustain a verdict against all the defendants on the ground that there was a common understanding and design to procure a separation.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 25, 26; Dec. Dig. § 19.* 7 Va.-W. Va. Enc. Dig. 179; 14 Va.-W. Va. Enc. Dig. 517; 15 Va.-W. Va. Enc. Dig. 466.]

3. **Torts (§ 21*)—Joint Tort-Feasors—"Aider and Abettor."**—One present at the commission of a tort encouraging or inciting the same by words, gestures, looks, or signs, or by any means countenancing or approving the act, is in law an "aider and abettor," and liable as principal.

[Ed. Note.—For other cases, see Torts, Cent. Dig. § 28; Dec. Dig. § 21.* 3 Va.-W. Va. Enc. Dig. 136; 14 Va.-W. Va. Enc. Dig. 225; 15 Va.-W. Va. Enc. Dig. 191.

For other definitions, see Words and Phrases, First and Second Series, Aider and Abettor.]

4. **Conspiracy (§ 2*)—Civil Liability—Alienation of Affections—Proof.**—In an action by a husband against the relatives of his wife, who had left him, for conspiring to procure a separation, plaintiff need not prove that the defendants came together and actually agreed in terms to bring about the separation and to pursue the end by common means; it being sufficient if it was shown that the defend-

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

ants pursued the same object by their acts with a view to its attainment.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 2; Dec. Dig. § 21.* 3 Va.-W. Va. Enc. Dig. 139; 14 Va.-W. Va. Enc. Dig. 225; 15 Va.-W. Va. Enc. Dig. 191.]

5. Trial (§ 295*)—Instructions—Requested Charge Substantially Given.—In an action for conspiracy to alienate the affections of a wife, where the instructions as a whole emphasized and reiterated the legal presumptions in favor of defendants, the burden of proof on the plaintiff, and the clearness of the evidence necessary to sustain such burden, the refusal of the court to instruct that the jury must be guided by reasonable inferences only, not by mere conjecture, in reaching a verdict, was not erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. § 295.* 7 Va.-W. Va. Enc. Dig. 707; 14 Va.-W. Va. Enc. Dig. 563; 15 Va.-W. Va. Enc. Dig. 516.]

6. Conspiracy (§ 21)—Alienation of Affections—Question for Jury.—In an action by a husband against the relatives of his wife for a conspiracy to alienate her affections, whether the defendants or any of them gave advice to the wife to induce a separation, indulged in solicitation, used any compulsion, or made any threats to that end, or entertained any malice toward the plaintiff, held for the jury under the evidence.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 28, 29; Dec. Dig. § 21.* 3 Va.-W. Va. Enc. Dig. 132; 14 Va.-W. Va. Enc. Dig. 225; 15 Va.-W. Va. Enc. Dig. 191.]

7. Trial (§ 234)—Instructions—Conformity to the Evidence.—A requested instruction directing a verdict for defendant if the jury should find certain facts, but based on an incomplete and partial statement of the evidence, is properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 534-538, 566; Dec. Dig. § 234.* 7 Va.-W. Va. Enc. Dig. 718; 14 Va-W. Va. Enc. Dig. 563; 15 Va.-W. Va. Enc. Dig. 513.]

8. Conspiracy (§ 14*)—Civil Liability—Alienation of Affections.—In a husband's action against the relatives of his wife for conspiring to alienate her affections, a recovery might be had against two or more of the defendants if the charge of conspiracy was sustained, and against any one or more for individual responsibility if no conspiracy was proved, since the damage to the plaintiff, and not the conspiracy, was the gist of the right of action.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 14; Dec. Dig. § 14.* 3 Va.-W. Va. Enc. Dig. Dig. 139; 14 Va.-W. Va. Enc. Dig. 225; 15 Va.-W. Va. Enc. Dig. 191.]

9. Appeal and Error (§ 167*)—Harmless Error—Misjoinder of Defendants—Instructions.—Under Code 1904, 3258a, providing that when-

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

ever a misjoinder of parties shall appear in any action, the court may order the action and suit to abate as to any party improperly joined, and to proceed against the others, where there was a misjoinder of parties defendant in a husband's action against his wife's parents, brothers, and sister for conspiracy to alienate, a reversal could not be had because of the refusal of a requested charge that unless the plaintiff proved a conspiracy by all of the defendants there could be no recovery; since no real difficulties from misjoinder of the defendants could arise in view of the statute.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4229; Dec. Dig. § 1067.* 10 Va.-W. Va. Enc. Dig. 750; 14 Va.-W. Va. Enc. Dig. 808; 15 Va.-W. Va. Enc. Dig. 777.]

10. Appeal and Error (§ 1067*)—Harmless Error—Variance—Instructions.—Under Code 1904, § 3384, providing that, if at the trial of any action there is a variance between proof and pleadings, the court, if substantial justice will be promoted, and the opposite party will not be prejudiced, may allow amendment of the pleadings to conform with proof, in a husband's action against the relatives of his wife for alienation of her affections, a charge that, unless the plaintiff prove conspiracy by all the defendants, there could be no recovery, was properly refused; since any variance between the parties alleged to be liable and those shown by proof to be so could be cured by amendment under the statute.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4229; Dec. Dig. § 1067.* 1 Va.-W. Va. Enc. Dig. 326; 14 Va.-W. Va. Enc. Dig. 45; 15 Va.-W. Va. Enc. Dig. 41.]

11. Trial (§ 261.*)—Instructions—Requested Incorrect Instructions—Duty of Court.—The court may refuse an incorrect requested instruction, and is not bound to modify it or give any other instruction in its place.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 484, 660, 671, 673, 675; Dec. Dig. § 261.* 7 Va.-W. Va. Enc. Dig. 708; 14 Va.-W. Va. Enc. Dig. 562; 15 Va.-W. Va. Enc. Dig. 510.]

Error to Law and Equity Court of City of Richmond.

Action by Thomas Grant Walker against H. L. Ratcliffe and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Meredith & Cocke, of Richmond, for plaintiffs in error.

L. O. Wendenburg and *T. Gray Haddon,* both of Richmond, for defendant in error.

KELLY, J. This is an action of trespass on the case brought by Thomas Grant Walker against H. L. Ratcliffe and Alice, his

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

wife, and their children, Frank, John and Alice Ratcliffe. The declaration charges the formation and execution of a conspiracy to alienate from the plaintiff the affections of his wife, who was a daughter of H. L. and Alice Ratcliffe, and a sister of the other defendants. To a judgment for the plaintiff in the sum of $5,000 this writ of error was awarded.

The evidence is voluminous, and on some points conflicting, but, viewing it as on a demurrer, the following facts appear: The plaintiff at the time of his marriage was 32 years old, and resided in Richmond. His wife was 22, lived with her parents near Richmond (paying for her board), and was employed in the city as a stenographer. They had known each other for several years, and had been engaged for about 8 months. The plaintiff had for a long time been a frequent and apparently welcome visitor at her home, going there several times each week, and nearly always taking supper there on Sunday night. He had accumulated a small estate and was a man of good character. The defendants disclaim all knowledge of the engagement, but do not suggest any valid objection, and say that their only grievance was that they were not informed of the contemplated marriage. The ceremony took place on the morning of April 25, 1913, at the home of the officiating minister in Richmond, in the presence of the minister's wife and of a sister and brother-in-law of the plaintiff. The bride and groom both seemed to believe that the wedding would be opposed if their plans were known at her home, but the record discloses no just ground upon which to charge him with having pursuaded her against her will into a clandestine marriage. Every detail, in so far as not suggested by her, was arranged with her free and full approval. The plaintiff's sister advised her to tell her mother, but she thought it best not to do so. As soon as the ceremony was over she telephoned the news to her mother, and the latter was greatly affected, and at once became hysterical. The bride's father then came to the telephone and told her that she had about killed her mother, and ordered her never to put her foot in the home again. Both the father and the mother were very angry, and shortly afterwards used some very violent and threatening language with reference to the plaintiff, which need not in terms be repeated here.

After spending some hours in the city and having lunch at the Richmond Hotel with some of his relatives, the plaintiff and his wife started on the wedding trip which they had previously planned, taking an afternoon train for Washington. While on that train they received a telegram, addressed to Mrs. T. G. Walker and sent by John Ratcliffe, in these words:

"Your mother is dying. I would advise you to return to my house."

This telegram was sent at the suggestion of the sister, Alice Ratcliffe, made to John Ratcliffe over the telephone some hours after he had seen his mother and had left her to return to his business. After an hour later Frank Ratcliffe, who had just returned from a long trip, tried to reach Mrs. Walker with a telegram, which was never delivered, but which read as follows:

"Come home to-night, if possible. Mamma, I think, is dying Everything will be all right."

At the time he sent this telegram his mother was sitting in a rocking chair on the porch. He says:

"She looked very peculiar, slightly hysterical, and might say she was deranged, from her appearance."

He sent the telegram after his sister Alice had suggested that he "try to get Bettie," meaning plaintiff's wife.

Under the influence of the telegram from John Ratcliffe, the plaintiff and his wife left the train at a station called Doswell, and obtained by telephone some information from an aunt and from another brother of the plaintiff's wife, which indicated that the telegram was a fabrication, but they decided, largely upon his judgment and recommendation, that it would be best to return and investigate the situation. Upon their arrival in Richmond they went to his family home. While at supper there Mrs. Walker was called to the telephone to talk to her brother, Frank Ratcliffe, and their conversation resulted in an arrangement by which he was to meet her at Seventh and Broad streets, in Richmond, and take her to her father's home that night. He would not agree for her husband, the plaintiff, to bring or even accompany her, claiming that "his presence or the very mention of his name would mean instant death" to her mother. Mrs. Walker wanted her husband to accompany her, and she waved and smiled at him as she left with her brother and took the street car for her home, promising to call him up the next morning. It is significant, and is pertinent in this connection, that up to this moment of separation there had been no indication that she regretted her marriage or had any thought of giving up her husband. She was distressed about the attitude of her parents, but after she knew of that she willingly started on the wedding trip, and would have continued the journey after the telegram was received if her husband had insisted upon that course; in fact, the more probable conclusion from the evidence is that, but for his positive advice to the contrary, they would have gone on to Washington. On the train that afternoon, and also after she had returned to Richmond that evening, she was making a list of the names of friends for whom she intended announcements of her marriage. It is

beyond question that the courtship of this couple had been a long and happy one, and that they had been devoted to each other. Another fact worthy of consideration in connection with the circumstances surrounding this parting between them at Seventh and Broad streets is that John Ratcliffe was present on that occasion, and claimed in the presence of plaintiff and his friends, and in rather conspicuous manner, that he was going to his own home in the city for the night, but, instead, went almost immediately to the home of his father in the country, arriving there about 30 minutes after Frank Ratcliffe and Mrs. Walker arrived.

Mrs. Walker found her mother in bed and, as she thought, in a sort of stupor. The record shows conclusively that her condition was not, in fact, and had not been at any time, alarming. It may have been made to appear otherwise to Mrs. Walker. There had been no reasonable ground at any time that day for saying that she was dying, and after Mrs. Walker arrived she, and not her mother, was the center of interest and attention on the part of the family. Her brother Frank told her, in substance, that night in the presence of her brother John that she could see for herself what her mother's condition was; that she had caused it; that he would take her back that night or the next day if she wanted to return to Walker, but that there was no middle ground, and she must choose between Walker and her family. Before this interview was concluded her father came in the room and told her that if Walker came there that night he would shoot him Her mother had stated during the day that if Walker came on the place she would "cut his heart and liver out," and had used other expressions indicating a high degree of temper and ill will towards the plaintiff. Her father and her brothers, Frank and John, had told Dr. Redd during the day that they were going to try to keep the plaintiff and his wife apart, or words to that effect. Mrs. Walker decided that night to give up her husband, taking from her finger her engagement ring and wedding ring and turning them over to one of her brothers. It was agreed that her brother Frank should take her out of the state to some place which was not fixed upon that night. Later on in the night, in compliance with a suggestion which they say came from Mrs. Walker, John and Frank went to the home of an attorney who had been theretofore acting as counsel for John Ratcliffe, and arranged with him to come to the Ratcliffe home the next day for a conference. This was the Friday night of the wedding day. The next day the plaintiff, who had requested to see his wife, was permitted to see her at John Ratcliffe's home, but was not allowed a private interview; both John and Frank Ratcliffe were there at the time, and, while the plaintiff was left for a

few moments with his wife in the parlor, one or the other of the brothers was in a position to hear everything that was said all the time. John had in his possession, and delivered to her there, her engagement ring and wedding ring, and she in turn delivered them to her husband, and told him that she had made a mistake in marrying him, and wanted to be released. After Walker had left the house, John Ratcliffe commended Mrs. Walker's decision to go to Pittsburg advising her to go on there and "forget everything except that she had two friends" (meaning himself and Frank) who would supply her need adding however that if she should decide to come back to Walker he had nothing to do with that. On the next day, which was Sunday, Frank took her to Pittsburg, where she lived under her maiden name in the family of an intimate friend of his until this suit was brought.

After she went to Pittsburg the plaintiff, having secured her address, wrote her several times and visited her once, earnestly appealing her to come back to him, but without avail. The Ratcliffe family kept in close touch with her, and her mother and brother Frank visited her shortly after the plaintiff had been to Pittsburg to see her. Finally the plaintiff, giving up all hope of reconciliation, instituted this suit.

[1] The fundamental question here presented, as to the liability of the immediate family of the consort in a suit for alienation, as distinguished from the liability of a stranger, is new in Virginia, but has frequently arisen in other jurisdictions. The general rule, consonant with reason and sustained by authority, is that parents may advise their children about their domestic affairs without incurring liability, if the advice be given in good faith and prompted by worthy motives, even though such advice results in a separation and estrangement of husband and wife. Bad and improper motives will not be presumed as against parents, but must be clearly proved. The burden in such cases is upon the plaintiff to show that the parent has been prompted by malice; the presumption being that what he has said and done has been due to natural affection and to a regard for the best interests of the child. When, however, it is made to appear by clear and satisfactory evidence that the parent has been actuated by malice, and has willfully interfered on that account, and not on account of the welfare of his child, to bring about a separation, an action will lie against him for damages. The law on this subject is so satisfactorily discussed and so many pertinent authorities are cited in the case of Multer *v.* Knibbs, 193 Mass. 556, 79 N. E. 762, 9 L. R. A. (N. S.) 322-325, 9 Ann. Cas. 958, that we deem it proper to quote somewhat at length from the opinion in that case:

"There is a material difference between the acts of a parent

and those of a mere intermeddler. Even in the latter case a defendant may disprove any intent on his part, in advising the wife, to cause a separation, and may show that his advice was given honestly. Tasker *v.* Stanley, 153 Mass. 148, 26 N. E. 417, 10 L. R. A. 468. But the rights and the corresponding duties of a parent are much greater than those of a stranger; and much stronger evidence is required to maintain an action against him. It is proper for him to give to his daughter such advice, and to bring such motives of persuasion or inducement to bear upon her as he fairly and honestly considers to be called for by her best interests, and he is not liable to her husband in damages for her desertion resulting therefrom unless he has been actuated by malice or ill will towards the plaintiff, and not by a proper parental regard for the welfare and happiness of his child. In such an action the material question is the intent with which the parent acted, rather than the wisdom, or even the justice, of the course which he took. These questions have arisen in other jurisdictions; and, so far as we have been able to discover, they always have been answered in the same way. The leading case is Hutcheson *v.* Peck, 5 Johns. [N. Y.] 196; and the doctrine there laid down has commanded assent. Oakman *v.* Belden, 94 Me. 280, 47 Atl. 553, 80 Am. St. Rep. 396; Smith *v.* Lyke, 13 Hun [N. Y.] 204; Holtz *v.* Dick, 42 Ohio St. 23, 51 Am. Rep. 791; Westlake *v.* Westlake, 34 Ohio St. 621, 32 Am. Rep. 397; Rice *v.* Rice, 104 Mich. 371, 62 N. W. 833; White *v.* Ross, 47 Mich. 172, 10 N. W. 188; Tucker *v.* Tucker, 74 Miss. 93, 19 So. 955, 32 L. R. A. 623; Payne *v.* Williams, 4 Baxt. [Tenn.] 583; Glass *v.* Bennett, 89 Tenn. 478, 14 S. W. 1085; Brown *v.* Brown, 124 N. C. 19, 32 S. E. 320, 70 Am. St. Rep. 574; Huling *v.* Huling, 32 Ill. App. 519; Reed *v.* Reed, 6 Ind. App. 317, 33 N. E. 638, 51 Am. St. Rep. 310. * * * And the burden is upon the plaintiff to show that the defendant has been prompted by malice in what he has said and done, and to overcome the presumption that he acted under the influence of natural affection and for what he believed to be the real good of his child. Bennett *v.* Smith, 21 Barb. [N. Y.] 439; Pollock *v.* Pollock, 9 Misc. Rep. 82, 29 N. Y. Supp. 37; White *v.* Ross, Westlake *v.* Westlake, and Brown *v.* Brown, supra; Young *v.* Young, 8 Wash. 81, 35 Pac. 592; Reed *v.* Reed, supra. But if there is evidence upon which the jury would have a right to find that the defendant has actively interfered to cause his daughter to abandon her husband, and has deprived him of her affections and of the comfort and solace of her society, and has done this from malice to the plaintiff, and not for the purpose of affording proper protection to his child and furthering her true welfare, then the case must be left to the jury, with the instruction that, if these facts are proved,

the action may be maintained. Holtz *v.* Dick, supra; Price *v.* Price, 91 Iowa, 693, 60 N. W. 202, 29 L. R. A. 150, 51 Am. St. Rep. 360; Tucker *v.* Tucker and Bennett *v.* Smith, supra; Williams *v.* Williams, 20 Colo. 51, 37 Pac. 614; Railsback *v.* Railsback, 12 Ind. App. 659, 40 N. E. 276, 1119. This was recognized by all the judges in Hutcheson *v.* Peck, 5 Johns. [N. Y.] 196. The question accordingly is whether there was such evidence in this case."

The principles above announced have usually found expression in actions against the father, but they seem to apply as well to mother, brothers, and sisters. Powell *v.* Benthall, 136 N. C. 145, 48 S. E. 598; Miller *v.* Miller, 154 Iowa, 344, 134 N. W. 1058; note to Geromini *v.* Brunelli, 46 L. R. A. (N. S.) 465; Glass *v.* Bennett, supra.

There is no essential difference between counsel for plaintiff and defendants upon the substantive law of this case; their differences being found in the application of the law to the evidence and in certain collateral questions arising in the course of the trial.

[2] The first ground upon which we are asked to reverse the judgment is that the evidence was not sufficient to warrant a verdict against any of the defendants; and this ground is especially urged as to H. L. Ratcliffe and wife and their daughter Alice.

We do not think this contention can be sustained. The evidence is so voluminous as to preclude the possibility of bringing any detailed discussion or recital of it here within reasonable limits. We have considered it carefully, and are of opinion that the direct testimony, together with the fair inference from the circumstances and from the conduct of the parties, warranted the jury in finding a verdict against all of the defendants. It is strongly urged on behalf of H. L. Ratcliffe and wife that their threats against the plaintiff and their manifest ill temper towards him should not be considered as evidence against them, because under the law their anger should be attributed not to malice, but to their affection for their daughter and to a concern for her best interests. The mere fact that these defendants manifested ill will towards the plaintiff would not be sufficient to overcome the legal presumption in their favor, but we think the record disclosed sufficient facts and circumstances to justify the court in submitting the question to the jury, and to justify the jury in finding against the defendants. They themselves say that if their consent had been sought they would have acquiesced, and would have wished the young couple well, and they were unable to suggest a single satisfactory reason why the marriage should not have occurred.

[3] More activity in bringing about the separation was displayed by some than by others of the defendants. All five of them, however, were in the home together when the separation was agreed upon. The evidence in its entirety, if it does not impel the conviction, is sufficient to sustain the jury's conclusion that there was a common understanding and a common design. Any person present at the doing of a wrong, "encouraging or inciting the same by words, gestures, looks or signs, or who by any means countenances or approves the same, is in law deemed to be an aider and abettor, and liable as principal." Daingerfield v. Thompson, 33 Grat. (74 Va.) 136, 151, 36 Am. Rep. 73.

[4] In concluding this branch of the case we quote with approval the following language from the opinion of the judges who presided at the trial:

"The two main questions of fact to be decided by the jury in this case were whether a conspiracy existed among the defendants, and whether they maliciously sought to deprive the plaintiff of the society of his wife. Such issues are especially for the determination of a jury, as their decision so largely turns upon inferences from the evidence as to motives and intent, which are, as a rule, not capable of direct proof. The evidence in cases involving conspiracy, malice, and fraud is apt to be circumstantial only. As said by Mr. Greenleaf (Evidence, vol. 3, § 93): 'The evidence in proof of a conspiracy will generally, from the nature of the case, be circumstantial. Though the common design is the essence of the charge, it is not necessary to prove that the defendants came together and actually agreed in terms to have that design, and to pursue it by common means. If it be proved that the defendants pursued by their acts the same object, often by the same means, one performing one part and another another part of the same so as to complete it, with a view to the attainment of that same object, the jury will be justified in the conclusion that they were engaged in a conspiracy to effect that object.'

"Upon a careful consideration of all the evidence in the case, viewed in the light of these established principles of law, I am unable to hold that the verdict of the jury was so plainly against the evidence or so palpably without evidence that it is the duty of the court to set it aside. The case involved the scanning of various phases of human conduct under the circumstances in which the parties were placed, with inferences to be drawn as to the intent and motives by which they were actuated. Conclusions upon such matters are peculiarly for the judgment of a jury, and, while the direct testimony is not very convincing, and not equally strong against all of the defendants, yet the volumi-

nous evidence discloses sufficient facts, in a case of this character, to render the conclusion of the jury final, so that the court is without power to disturb it."

We pass now to a consideration of the alleged errors in the instructions to the jury.

[5] Complaint is made that the court refused to amend one of its instruction so as to tell the jury that they must be guided by reasonable and natural inferences only, and not by mere conjecture and suspicion. The instructions, taken as a whole, emphasize and reiterate the legal presumptions in favor of the defendants, the burden of proof on the plaintiff, and the character and clearness of the evidence necessary to sustain that burden, and we are satisfied that the defendants could not have been prejudiced by the refusal of the court to make the amendment in question.

[6] The defendants asked the court, in what they designate as prayer No. 3½, to tell the jury "that there was no proof:" (1) That the defendants, or any of them, gave any advice to the wife to induce a separation; (2) indulged in any solicitation or used any compulsion to that end; (3) made any threats to that end; (4) entertained any malice towards the plaintiff. Under our view of the law and the evidence, this prayer was properly denied. The instruction requested would have improperly withdrawn from the jury a state of facts and circumstances peculiarly within its province.

[7] Defendants' prayer No. 13 was also properly refused. The instruction requested was as follows:

"The jury are instructed that, if they believe from the evidence that there was not exercised by any one or more of the defendants either compulsion or solicitation to cause or persuade plaintiff's wife to separate and remain away from him, and that all that was said by any one of the defendants as to such separation was the statement of Frank Ratcliffe that she saw the condition in which her mother was, that if she desired it he would take her to her husband that night or the next day, as she might prefer, but that there could be no middle course, and that she must understand that she must choose between her own family and her husband, and that she thereupon asked the said Ratcliffe whether, if she should decide to stay with her family, he would protect her, to which he replied that he would give her all the protection in his power, and that thereupon she asked him if he would take her away, to which he replied that he would if she desired to go, then the jury must find for the defendant."

This instruction singled out one statement of the defendant Frank Ratcliffe in a context which might have led the jury to infer that the court did not regard the statement as of serious

import, and tended to withdraw that statement from consideration by the jury in the light of the temper and attitude which all of the defendants had assumed towards the plaintiff's marriage at the time the statement was made. It ignored John Ratcliffe's encouragement to her to go on to Pittsburg, and disregarded a number of other facts and circumstances proper for the jury to consider in determining the purpose and probable effect of the statement recited in the instruction, and directed a verdict for the defendants upon a partial and incomplete view of the evidence. Instructions of this character have repeatedly been condemned by this court. See Vaughan M. Co. *v.* Staunton Tea Co., 106 Va. 452, 56 S. E. 140; Southern Ry. Co. *v.* Baptist, 114 Va. 723, 77 S. E. 477.

[8-10] Instruction No. 4 requested by defendants was properly refused. It would have told the jury that, unless the plaintiff proved a conspiracy by all of the defendants, there could be no recovery. The argument used for this instruction is based on the claim that the plaintiff was bound to prove the conspiracy as alleged. If by this it is meant that in an action like this there must be a recovery against all or none of the defendants, the contention is plainly untenable. The damage to the plaintiff, and not the conspiracy, was the gist of the action, and the court in other instructions properly told the jury, in effect, that they might find a verdict against two or more of the defendants, if the charge of conspiracy was sustained, and as to any one or more for individual responsibility if no conspiracy was proved. 5 R. C. L. § 56, p. 1106; Porter *v.* Mack, 50 W. Va. 581, 40 S. E. 459; 1 Cooley on Torts (3d Ed.) 210-214; 4 Enc. Pl. & Pr. 738, 739. Independently of these authorities, any real difficulties that could arise in a case like this from a misjoinder of defendants or a variance between the allegations and the proof are fully met by sections 3258a and 3384 of the Code.

[11] In so far as the argument for instruction No. 4 relates to the proof of the methods by which the alleged conspiracy was carried out, conceding it to have been right in this respect, it is sufficient to say that the error already pointed out eliminates the instruction from further consideration. The other instructions, as given, were correct and free from ambiguity, and there was no duty upon the court to modify and give this one or to give a new one in its place. C. & O. Ry. Co. *v.* Stock, 104 Va. 97, 110, 51 S. E. 161.

With respect to the remaining exceptions to the action of the court in giving or refusing instructions, we deem it sufficient to say that no new or novel questions are presented therein, and that the instructions in the aggregate seem to us to have fairly and fully submitted the law of the case to the jury. It is not too much to say that the instructions, considering the number

asked for and the number actually given, were remarkably accurate and clear as a whole.

The judgment complained of is affirmed.

Note.

Liability of a Wife's Relatives for Alienating Her Affections. —Under the common law a husband has the right to demand legal redress from whosoever alienates his wife's affections whether this person be a stranger or a relative. Barbee *v.* Armstead, 10 Ired. 530; 51 Am. Dec. 404; Tasker *v.* Stanley, 153 Mass. 148; Glass *v.* Bennett, 89 Tenn. 478; Hermance *v.* James, 47 Barb. 120; 32 How. Pr. 142; Adams *v.* Main, 3 Ind. App. 232; Bigaoutte *v.* Paulet, 134 Mass. 123; 45 Am. St. Rep. 307; Holtz *v.* Dick, 42 Ohio St. 23; 51 Am. Rep. 791; Hadley *v.* Heywood, 121 Mass. 236; Rinehart *v.* Bills, 82 Mo. 534; 52 Am. Rep. 385; Higham *v.* Vanosdol, 101 Ind. 160; Bennett *v.* Smith, 21 Barb. 439; Ramsey *v.* Ryerson, 24 Abb. N. C. 114; Preston *v.* Bowers, 13 Ohio St. 1; 82 Am. Dec. 430; Edgell *v.* Francis, 66 Mich. 303; Gilchrist *v.* Bale, 8 Watts, 355; 34 Am. Dec. 469. The only distinction, apparently, between the liability of a stranger and the liability of a relative, is the degree of proof necessary to establish the wrongful intent actuating the defendant. This wrongful intent or improper motive is denominated "malice" in the eyes of the law and such malice is always a necessary element to be proved by the plaintiff (Boland *v.* Stanley 88 Ark. 562, 129 Am. St. Rep. 114, 115 S. W. 163); and the question is ordinarily one for the jury (Kelso *v.* Kelso, 43 Ind. App. 115, 86 N. E. 1001).

"The term malice does not necessarily mean that which must proceed from a spiteful, malignant or revengeful disposition, but a conduct injurious to another, though proceeding from an ill-regulated mind not sufficiently cautious before it occasion the injury. If the conduct was unjustifiable, and actually caused the injury complained of, malice in law would be implied." The terms "malice" and "improper motives," mean the same thing. Brown *v.* Brown, 124 N. C. 19.

In the case of a stranger defendant who has alienated the affections of the wife, the burden is always upon him to show that he was actuated by proper motives. Boland *v.* Stanley, 88 Ark. 562.

While in the case of a relative, especially of a parent, the law presumes that he acted in good faith and that his conduct was merely such conduct as was proper for a parent to take when the welfare and happiness of his daughter was in issue. Boland *v.* Stanley, 88 Ark. 562.

Hence, the burden rests upon the plaintiff to prove that such parent or relative was actuated by malice or improper motives. In addition to authorities cited in the principal case the following cases sustain the rule. Hossfeld *v.* Hossfeld, 110 C. C. A. 131, 188 Fed. 61; Jonas *v.* Hirshburg, 18 Ind. App. 581, 48 N. E. 656; Workman *v.* Workman, 43 Ind. App. 382, 85 N. F. 997; Heisler *v.* Heisler, 151 Iowa 503, 131 N. W. 676; Corrick *v.* Dunham, 147 Iowa 320, 126 N. W. 150; Busenbark *v.* Busenbark, 150 Iowa 7, 139 N. W. 332; Miller *v.* Miller, 154 Iowa 344, 134 N. W. 1058; Cornelius *v.* Cornelius, 233 Mo. 1, 135 S. W. 65; Miller *v.* Miller, 122 Mo. App. 693, 99 S. W. 757; Fronk *v.* Fronk, 159 Mo. App. 543, 141 S. W. 692; Allen *v.* Forsythe, 160 Mo. App. 262, 142 S. W. 820; Greuneich *v.* Greuneich, 23 N. D. 368, 137 N. W. 415; Beisel *v.* Gerlach, 221 Pa. 232, 18 L. R. A. (N. S.) 516, 90 Atl. 721; Gross *v.* Gross, 70 W. Va. 317, 39 L. R. A. (N. S.) 261, 73 S. E. 961; Jones *v.* Monson, 137 Wis. 478, 129 Am. St. Rep. 1082, 119 N. W. 179.

It is highly proper that good motives on the part of a parent and

relatives should be presumed. "The father's house is always open to his children; and whether they be married or unmarried, it is still to them a refuge from evil, and a consolation in distress." Hutcheson, v. Peck, 5 Johns 196.

A father should and may give honest advice to a daughter in distress, growing out of unhappy marital relations. Glass v. Bennett, 89 Tenn. 478; Smith v. Lyke, 13 Hun. 204; Tasker v. Stanley, 153 Mass. 148; Holtz v. Dick, 42 O. St. 23. "He may in good faith and for her own welfare advise his daughter to abandon her husband, if he fairly and honestly believes that the continuance of the marriage relation will tend to injure her health or to destroy her peace of mind, and may persuade her by proper and reasonable arguments to do so, without being liable to her husband, even though it may turn, out that he acted upon mistaken premises or false information, and that the results of his intervention have been unfortunate. Oakman v. Belden, 94 Me. 280, 80 Am. St. Rep. 396, 47 Atl. 553; Payne v. Williams, 4 Baxt. 583; and Tucker v. Tucker, 74 Miss. 93, 32 L. R. A. 623, 19 So. 955. He may tell her that by returning to her husband she will lose the share of his estate which she otherwise would receive. Hutcheson v. Peck, 5 Johns. 196, 207. And the burden is upon the plaintiff to show that the defendant has been prompted by malice in what he has said and done, and to overcome the presumption that he acted under the influence of natural affection and for what he believed to be the real good of his child. Bennett v. Smith, 21 Barb. 439; Pollock v. Pollock, 9 Misc. 82, 29 N. Y. Supp. 37; White v. Ross, 47 Mich. 172, 10 N. W. 188; Westlake v. Westlake, 34 Ohio St. 621, 32 Am. Rep. 397; and Brown v. Brown, 124 N. C. 19, 70 Am. St. Rep. 574, 32 S. E. 320; Young v. Young, 8 Wash. 81, 35 Pac. 592; Reed v. Reed, 6 Ind. App. 317, 51 Am. St. Rep. 310, 33 N. E. 638. But if there is evidence upon which the jury would have a right to find that the defendant had actively interfered to cause his daughter to abandon her husband, and has deprived him of her affections and of the comfort and solace of her society, and has done this from malice to the plaintiff, and not for the purpose of affording proper protection to his child and furthering her true welfare, then the case must be left to the jury, with the instruction that, if these facts are proved, the action may be maintained. Holtz v. Dick, 42 Ohio St. 23, 51 Am. Rep. 791; Price v. Price, 91 Iowa, 693, 29 L. R. A. 150, 51 Am. St. Rep. 360, 60 N. W. 202; Tucker v. Tucker, 74 Miss. 93, 32 L. R. A. 623, 19 So. 955; and Bennett v. Smith, 21 Barb. 439; Williams v. Williams, 20 Colo. 51, 37 Pac. 614; Railsback v. Railsback, 12 Ind. App. 659, 40 N. E. 276, 1119. This was recognized by all the judges in Hutcheson v. Pack, 5 Johns. 196." Cited in Multer v. Knibbes, 193 Mass. 556, 79 N. E. 762, 9 L. R. A. (N. S.), 322, 325.

The presumption of good faith accorded the parents of the wife is likewise indulged in when other near relations are sought to be held liable. Thus a stepson is accredited with good motives when accused of alienating the affections of his stepmother. McGregor v. Smith, 115 S. W. 802.

Likewise brothers, sisters and even a sister-in-law are presumed to have acted in good faith. Allen v. Forsythe, 160 Mo. App. 262, 142 S. W. 820; Miller v. Miller, 154 Iowa 344, 134 N. W. 1058.

A guardian stands in the relation of parent to a child and the same protection thrown around the advice and conduct of a parent and child is likewise extended to a guardian, and he is presumed to have acted in good faith in advising upon a course of conduct even though such advice leads to her separation from her husband. Trumbull v. Trumbull, 71 Neb. 186, 98 N. W. 683, 8 Am. Cas. 812.